In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1390

D. R. SMALLEY & SONS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-5a) is reported at 372 F. 2d 505.

JURISDICTION

The decision of the Court of Claims was entered on February 17, 1967. The petition for a writ of certiorari was filed on May 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

Whether a firm which has contracted with the State of Ohio to construct Federal-Aid highways may recover from the United States for alleged breach or inaction by the State under that contract.

STATUTES INVOLVED

28 U.S.C. 1491 provides in pertinent part as follows:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The provisions of the Federal-Aid Highways Act, 23 U.S.C. 101 *et seq.*, are set forth in Appendix B to the petition (pp. 6a-35a).

STATEMENT

Petitioner, an Ohio construction firm, sued to recover damages allegedly incurred in connection with six contracts awarded by the Ohio Highway Department for the building of Federal-Aid highways. On two of the contracts, petitioner was principal contractor; on the other four, it was a subcontractor. Dissatisfied with an award of $195,690 by the Ohio Sundry Claims Board, petitioner brought suit against

the United States for $6,000,000 in the Court of Claims, although all its (and its prime contractor's) contracts were with the State of Ohio (Pet. App. 1a-2a). The action was dismissed by the Court of Claims for failure to state a claim on which recovery against the government could be based (Pet. App. 5a).

ARGUMENT

Since the United States is not a party to any of petitioner's contracts, and there is no congressional enactment permitting suits to be brought against the United States by contractors under the Federal-Aid Highways program, 23 U.S.C. 101 *et seq.*, the Court of Claims correctly dismissed petitioner's suit. The decision below is in accord with the only prior decision on the point, *Public Water Supply Dist. No. 6* v. *United States*, 66 F. Supp. 66 (W.D. Mo.), and there is no occasion for further review.[1]

Petitioner contends that it has a contract with the United States because, it alleges, the State of Ohio, in making contracts with it, was acting as an "agent" for the United States. Petitioner observes that under the Federal-Aid Highways Act the United States reimburses the States for 90 percent of their expenditures (23 U.S.C. 120(c)); that the Bureau of Public

[1] The paucity of suits by Federal-Aid Highway contractors against the United States, in the 50 years since the inception of the program (see Federal-Aid Road Act of 1916, 39 Stat. 355), is a strong indication that the thousands of contractors under the program have recognized the obvious fact that they have no contract with the United States.

Roads approves such contracts and inspects the actual construction (23 U.S.C. 105, 106, 112); and that the United States, as well as the contracting State, receives a benefit from the contract. It does not follow, however, that petitioner has a contract with the United States or a cause of action within the jurisdiction of the Court of Claims.[2]

Petitioner's assertion that the legal relationship[3] between the federal and State governments, with regard to the Federal-Aid Highways program, is one of agency is plainly erroneous. See *Eden Memorial Park Ass'n* v. *United States*, 300 F. 2d 432, 439 (C.A. 9).

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[2] The Court of Claims could, and did, as its opinion indicates (Pet. App. 2a-5a), take jurisdiction for the limited purpose of determining *whether* petitioner stated any claim based upon a contract, a federal statute, or the Constitution, for which relief could be granted. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246; cf. *Bell* v. *Hood*, 327 U.S. 678. The court below properly determined that the allegations of the complaint completely failed to state any proper claim against the United States.

[3] The status of the various parties under the Federal-Aid Highways Act and the contracts entered into pursuant to that Act, is a legal question which the Court of Claims properly decided on motion for summary judgment. Petitioner's contention that the court below erred in so proceeding (Pet. 15-17) is thus without merit.

In addition to the statutory provisions noted above, petitioner also appears to rely upon the provision in 23 U.S.C. 106(a) that the approval of a project by the Secretary of Commerce "shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." But this provision is of no assistance to petitioner, for it is clear that the contractual obligation referred to is one running to the States, in return for their reciprocal obligations, and not to private contractors (*e.g.*, 23 U.S.C. 114, 116).

The grants-in-aid under the Federal-Aid Highways program

> * * * are designed to encourage states to construct their own highways and * * * the primary function of the Bureau of Public Roads, in approving plans submitted to it by a state and inspecting roads during and after construction, is that of making sure that federal appropriations are being utilized properly and efficiently by the respective states and are not being wasted.

Mahler v. *United States*, 306 F. 2d 713, 716 (C.A. 3), certiorari denied, 371 U.S. 923. As pointed out in *Mahler*, 306 F. 2d at 716-717, the States in awarding construction contracts under this program act on their own behalf; they "remain responsible for supervision of construction and for the maintenance of the highways after completion" (23 U.S.C. 114, 116), and "are at all times the owners of the roads and are primarily responsible for their operation."[4] Under the project agreements between the United States and Ohio, the federal government "did not, in any respect, assume any obligation to [the] contractors or create any liability on the United States Government for any work performed by them in conformity with their contracts with the [State Highway Commission]." *Public Water Supply Dist. No. 6* v. *United States*, *supra*, 66 F. Supp. at 70-71.

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[4] See also S. Rep. No. 1965, 84th Cong., 2d Sess., p. 4 (1956):

> The committee emphasizes that the program authorized herein is not one by which the Federal Government will construct highways, but a Federal-aid program within the framework of existing laws, rules, and procedures.

Plainly there was no express contract between the United States and petitioner, and no basis for implying one.[5] The approval of such contracts by the Bureau of Public Roads, and its inspection of the actual construction, serve one purpose—to ensure "that federal appropriations are being utilized properly and efficiently by the respective states and are not being

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[5] An "implied" contract which will sustain a suit against the United States must be one implied in fact, not in law. *E.g., Merritt* v. *United States*, 267 U.S. 338, 341. Petitioner failed to allege any facts from which it can be implied that the United States intended to contract with it. Its petition in the Court of Claims simply alleged (p. 8) that there was a contract implied in fact by virtue of the provisions of Title 23 of the United States Code; it suggested no other basis for implying a contract. Petitioner now asserts (Pet. 15), for the first time, that "if given the opportunity" it would have pointed out to the Court of Claims "specific times, places and the employees, officers and agents who have directly dealt with the Petitioner involving the claims in question," and that it was unable to make "certain allegations" (not specified) "because the facts are possessed" by government employees. Petitioner never suggested to the Court of Claims, in its petition and brief filed in that court, that it relied on anything other than the provisions of the Federal-Aid Highways Act for its contention that it had an implied contract with the United States. If petitioner did intend to rely on facts not alleged in its petition in the Court of Claims, it had not only the "opportunity" but the duty to state such facts in affidavits, in opposition to the government's motion for summary judgment. Rule 56(e), F. R. Civ. P.; Ct. Cl. Rule 64 (f). And petitioner's implication (Pet. 15) that there might exist some factual information of an unspecified nature supporting its contention, within the control of government agents, is frivolous. If there had been direct dealings between petitioner and government employees, petitioner would have equal access to that information.

wasted." *Mahler* v. *United States*, *supra*, 306 F. 2d at 716. Such provisions for approval of contracts and inspection of work performed under them do not make the United States a contracting party. For example, a subcontractor even under a standard government contract cannot sue the government, when he himself has not contracted with the United States. *United States* v. *Blair*, 321 U.S. 730, 737; cf. *Severin* v. *United States*, 99 Ct. Cl. 435, certiorari denied, 322 U.S. 733; *Beaconwear Clothing Co.* v. *United States*, 355 F. 2d 583, 590 (Ct. Cl.).

Petitioner's contention (Pet. 14-15) that there has been a "taking" of its property by the United States fails for much the same reasons. The allegations of its petition in the Court of Claims specifying the actions which it apparently contends constitute a "taking" of its property (contained in Paragraph 8 of that petition) without exception relate to actions of the State of Ohio.[6] There is no allegation that the federal government has interfered with the performance of petitioner's contracts with the State of Ohio or its prime contractor, or indeed that it has done anything more than perform the ordinary functions of approval of contracts, inspection, and reimbursement called for by the Federal-Aid Highways Act. Petitioner's "taking" argument is thus simply a reassertion of its erroneous theory that the United States may be sued

[6] See Pet. App. 2a-3a for a description of the actions alleged by petitioner to entail a "taking" in the Fifth Amendment sense. See also Pet. App. 5a, where the court below rejected this argument.

for the actions of the States in connection with the Federal-Aid highway program.[7]

Finally, petitioner urges (Pet. 11-13) that the Court of Claims had jurisdiction under 28 U.S.C. 1491 to render a judgment for it because its claim is founded on an Act of Congress or a regulation of an executive department. It is said that the provisions of the Federal-Aid Highways Act, 23 U.S.C. 101 *et seq.*, and the regulations promulgated thereunder, 23 C.F.R. 1.1 *et seq.*, are "ambiguous" as to whether Congress intended to permit parties having contracts with the States to sue the United States, and that the Court of Claims should have held an evidentiary hearing to resolve this ambiguity. However, the Federal-Aid Highways Act is not unclear on this point, and no need exists to take evidence in order to construe the statute. Congress has conspicuously omitted to provide for such contractors' suits against the United States. Petitioner points to no provision of the Federal-Aid Highways Act from which

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[7] For the United States to be liable for a constitutional "taking" of property, an action *by the government* involving a direct interference with, or disturbance of, *property* rights must be shown. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U.S. 445. Petitioner has not alleged such an action by the government, nor even an action by the State of Ohio constituting an interference with its property rights. It is evident from the factual allegations of the petition in the Court of Claims (as contrasted to its conclusory legal assertions) that the gist of the claim is an ordinary action in contract, for delays, etc., allegedly caused by one of the contracting parties, the State of Ohio. Cf. *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588.

it can even remotely be implied that Congress meant to confer on contractors the right to maintain such suits. In point of fact, there simply is no such provision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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